

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Advanced Television Systems )  
and Their Impact Upon the Existing )  
Television Broadcast Service )

MM Docket No. 87-268

OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE  
FIFTH REPORT AND ORDER AND OF THE SIXTH REPORT AND ORDER

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July 18, 1997

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### **Executive Summary**

Viacom reiterates in this Opposition its belief that the DTV Table has as a fundamental flaw is the enormous power-level disparity between NTSC VHF stations with digital UHF allotments ("V-to-U" stations) and NTSC UHF stations with UHF digital allotments ("U-to-U" stations). Accordingly, Viacom requests that the Commission deny on reconsideration proposals advanced by petitioners which would exacerbate the V-to-U/U-to-U power disparity, particularly those proposals that advocate establishing a protected DTV area that is equivalent to the NTSC Grade B contour, creating exceptions to the 1,000 kW power cap, and ultimately eliminating the cap. Instead, Viacom argues that the Commission adopt on reconsideration proposals that seek to reduce the power-level disparity, including promoting the principle of maximization, using channels 60-69, relaxing interference standards between and among U-to-U stations, and insuring through an amended Table or through mandated manufacturer standards the antenna and receiver performance levels assumed in the *Sixth Report and Order*. With respect to maximization, Viacom proposes that the Commission implement for immediate "intermediate maximization" for U-to-U stations in order that they may operate immediately at a level no less than one-fourth that of the highest-powered station in their markets.

Further, Viacom urges the Commission to grant on reconsideration other proposals suggested by petitioners that seek to foster a fair broadcast television system. Such proposals include the processing of modification applications pending as of April 3, 1997, the mandating of compensation for broadcasters required to make a double move for spectrum-packing purposes, the use of neutral private-sector coordinating committees for Table changes and technical modifications, and the granting of additional time for all

broadcasters to assess Table assignments under the recently released OET Bulletin No. 69.

Finally, Viacom proposes that the Commission facilitate a real-world "test market" study in one or two of the top ten television markets in which Viacom owns a station. This study will generate empirical data and provide support for fair assessment of the new digital service. Such test market studies would not only track the roll out of DTV in the top ten markets, as set forth in the *Fifth Report and Order*, but it would accelerate the schedule in that *all* broadcasters in a test market—including those not required to roll out digital until 2002— would commit to launching DTV by May 1, 1999. Viacom stands ready and willing to commit to such a test market study, provided that the data generated by the study is used by the Commission in reviewing the Table and, if necessary, amending the Table to reflect the real-world data collected.

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**TO: The Commission**

**OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE  
FIFTH REPORT AND ORDER AND OF THE SIXTH REPORT AND ORDER**

Viacom Inc. ("Viacom") respectfully submits this Opposition to numerous petitions for reconsideration filed in response to the Commission's *Fifth Report and Order*, FCC 97-116 (released April 21, 1997) ("*Fifth Report and Order*") and in the *Sixth Report and Order*, FCC 97-115 (released April 21, 1997) ("*Sixth Report and Order*") in the above captioned proceeding.

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**I. Background.**

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Viacom is the direct or indirect licensee of 11 commercial television stations in the top 30 television markets, 10 of which are UHF and 10 of which are UPN affiliates. In addition, Viacom is a 50% owner of the nascent UPN network, 140 of whose 166 primary and secondary affiliates nationwide are UHF stations. In light of the preponderance of UHF stations in which Viacom has either an ownership interest or a UPN network affiliation interest, Viacom reiterates that it is deeply concerned about a

fundamental flaw in the Table of Allotments adopted in the *Sixth Report and Order*: the enormous power-level disparity between NTSC VHF stations with digital UHF allotments ("V-to-U" stations) and NTSC UHF stations with UHF digital allotments ("U-to-U" stations).

In its Petition for Reconsideration of the Commission's *Fifth Report and Order* and *Sixth Report and Order*, Viacom noted that despite the implementation of a minimum power level of 50 kW for U-to-U stations and a power cap of 1,000 kW for V-to-U stations, at least two of its television stations —WKBD(TV), Detroit, and WUPA(TV), Atlanta— were assigned to operate at power levels *twenty times less* than those assigned to their V-to-U competitors. Indeed, as indicated by Viacom in its Petition, the Table will result in Viacom's WKBD(TV) operating at a mere 50 kW and attempting to compete head-to-head in the Detroit market with *three* V-to-U stations operating at 1,000 kW. The power-level disparity suffered by the Viacom station in Boston, which is nearly 15 times less than the power assigned to two V-to-U stations in that market, and by the Viacom station in Philadelphia, which is nearly 10 times less than the power assigned to two V-to-U stations in that market, also evidences the fundamental flaw in the Table.<sup>1</sup>

In its Petition, Viacom urged the Commission to alleviate the power disparity by reconstructing the Table in its entirety or by amending certain elements of the Table, as well as adopting measures external to the Table. Specifically as to the latter option, Viacom requested that the Commission: (1) modify its interference standards pursuant to

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<sup>1</sup> UPN affiliates that are not owned by Viacom also suffer tremendous power-level disparities. For example, in Greensboro, North Carolina, UPN affiliate WUPN, assigned to operate at 50 kW, will operate at a level 20 times less than that of the V-to-U CBS affiliate in that market. In Phoenix, UPN affiliate KUTP(TV), Phoenix, assigned to operate at 61.2 kW, will operate at a level more than 16 times less than that of four other stations in that market. The same disparity will occur in New Orleans, where UPN affiliate WUPL is assigned to operate at 60.5 kW, in a market where two V-to-U stations will be operating at 1000 kW and in Norfolk, Virginia, where WGNT is assigned to operate at 57.9 kW, in a market where a V-to-U CBS affiliate will be operating at 1000 kW. In Cleveland, UPN affiliate WUAB(TV), assigned to operate at 120.3 kW, will operate at a level more than 8 times less than that of the V-to-U ABC affiliate in that market. And in San Francisco, UPN affiliate KBHK(TV), assigned to operate at 197.5 kW, will operate at a level more than 5 times less than that of three V-to-U stations in the market.

the model proffered by Association of Local Television Stations ("ALTV") in evaluating the maximization proposals of U-to-U stations; (2) use Channels 60 through 69 to facilitate full maximization; (3) adopt "cut-off" procedures for broadcasters seeking to maximize digital facilities which permit stations to participate even if they do not yet hold a construction permit; (4) re-evaluate power levels based on the presumed use of direct-connected, indoor antennas; and (5) empirically evaluate performance standards of receiving equipment and antennas to determine whether the assumptions underlying the Table are accurate and, if they are not, adopt performance standards and/or adjust the Table to account for sub-standard performance.

Against the backdrop of these recommendations that attempt to reduce the U-to-U/V-to-U power disparity, Viacom in Section II disputes the suggestions advanced by some parties whose petitions for reconsideration, if granted, would thwart Viacom's proposals to mend the Table's inherent inequities and thereby continue to threaten the competitive viability of UHF stations. In Section III, Viacom reiterates proposals which seek to reduce the power-level disparity and points to other parties who subscribed to identical or similar concepts in their own petitions for reconsideration. One hybrid proposal forwarded by Viacom in this Section calls for immediate "intermediate maximization," which would permit U-to-U stations to increase their power immediately to a level that is no less than four times that of the highest-powered station in the market. In Section IV, Viacom highlights other petitions whose propositions also seek to foster a just and fair digital terrestrial television service that will best serve the American public. Finally, Section V of this Opposition suggests a new proposal, one involving television broadcasters serving two of the nation's top ten markets. Under this "test market" proposal there would be a prompt roll out of digital service by *all* broadcasters in certain markets for the express purpose of providing real-world data to the Commission upon which it can evaluate the Table in connection with the two-year review promised in the *Sixth Report and Order*.

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## II. The Commission Must Deny on Reconsideration Proposals That Would Exacerbate the U-to-U/V-to-U Power Disparity

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### A. Protected DTV Area That is Equivalent to the NTSC Grade B Contour

MSTV suggests that the power cap of 1,000 kW for all DTV stations operating in the UHF band deprives many V-to-U stations of a DTV service which replicates their NTSC Grade B contours while the Table permits many U-to-U stations to have DTV service that extends significantly beyond their NTSC Grade B contours.<sup>2</sup> In order to cure this perceived inequity, MSTV urges the Commission to protect the DTV service areas of all licensees out to the NTSC Grade B contour of the paired channel *or* to the DTV coverage contour, *whichever is greater*.<sup>3</sup> It should be noted that MSTV's petition for reconsideration does not reflect the position of all broadcasters. Indeed, as a member of MSTV, with a representative on the MSTV board and executive committee, Viacom vehemently disagrees with MSTV's service area proposal and the conclusions underlying that proposal.

As support for its contention, MSTV offers only two examples, both of which Viacom believes are misleading. In contrast, Viacom's independent engineering studies indicate that of its 11 television stations, seven will be unable to replicate their NTSC Grade B contours.<sup>4</sup>

One of the two examples cited by MSTV is that of KMTX, Roseburg, Oregon, a U-to-U station whose service area under the Table appears to be more than double that of its NTSC Grade B contour. Yet, upon closer examination, the station's larger DTV

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<sup>2</sup> Comments of MSTV at 9.

<sup>3</sup> *Id.* at 12, 29-30.

<sup>4</sup> The 7 Viacom stations unable to replicate their NTSC Grade B contours under the Table are: WPSG(TV), Philadelphia; WUPA(TV), Atlanta; WKBD(TV), Detroit; KTXA(TV), Dallas; KTXH(TV), Houston; WBFS(TV), Miami; and WDCA(TV), Washington, D.C.



service area is, in reality, reduced to that of the current Grade B contour when terrain loss is taken into account. The second MSTV example in support of its proposition concerns KING, Seattle, Washington, a V-to-U station whose service area under the Table appears to be reduced from that of its NTSC Grade B contour. Yet, upon closer scrutiny, it is clear that the slightly larger NTSC Grade B contour is actually smaller than that cited by MSTV as it is reduced by terrain loss in almost every geographic segment to a contour equalling that of the DTV service area. Despite MSTV's assertion to the contrary, judging by the proffered evidence at least, it appears that the discrepancies between DTV and NTSC Grade B contour areas in the two examples are negligible or even theoretical. The real issue remains the discrepancy in power levels between U-to-U and V-to-U broadcasters.

Even if V-to-U stations were to experience a loss of service area over that enjoyed by their NTSC facilities, it should be noted that the Commission designed the Table pursuant to the principle of replication, but did not intend that DTV service areas identically match Grade B contour areas. *Indeed, the Sixth Report and Order specifically seeks to balance replication—the enunciated objective of VHF stations—with the needs of UHF stations to maintain ease of reception within their core commercial areas:* "In considering the DTV power issue, we believe that it is important to adopt an approach that provides for a *high degree* of service replication by all stations, while at the same time ensuring that all stations are able to provide DTV service competitively within their respective markets."<sup>5</sup> Further, in promoting this balance, the Commission determined in the *Sixth Report and Order* that a 1,000 kW power limit "is sufficient to provide a very high degree of service replication for almost all stations" and at the same time poses less potential for interference among full service stations.<sup>6</sup> The Commission concluded: "This power level [limit] will also allow us to provide a more equitable distribution of

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<sup>5</sup> *Sixth Report and Order* at ¶30. (Emphasis added.)

<sup>6</sup> *Id.*

opportunities for maximization of service areas to full service DTV stations of all sizes."<sup>7</sup> Consequently, MSTV's proposal to extend DTV service areas out to at least the NTSC Grade B contour would secure so much protected spectrum for VHF stations as to foreclose lower-powered U-to-U stations from maximizing and remaining or becoming competitive in their core markets.

Thus, Viacom urges the Commission to deny this MSTV proposal and to protect only the DTV service area, even if that area is smaller than that of the NTSC Grade B contour. Denying such a proposal will not disenfranchise viewers. Rather, it will enable U-to-U stations to maximize so that they, too, can deliver their signals to at least their core markets and to the viewers in those markets. V-to-U stations that desire to maximize should also be permitted to maximize, but only subsequent to the immediate "intermediate maximization" period advanced by Viacom in Section III below and subject to the cut-off procedures detailed by Viacom in its Petition.

#### **B. Exceptions to the 1,000 kW Power Cap/Elimination of the Cap**

MSTV requested in its petition that in "limited cases" exceptions to the 1,000 kW power cap may have to be authorized to "ameliorate substantial replication shortfalls."<sup>8</sup> Additionally, MSTV asked that the Commission proceed, "as promised" in the *Sixth Report and Order*, to permit limited experimental operations at power levels above 1,000 kW and, in its planned two-year review, to consider an across-the-board relaxation of the cap if appropriate.<sup>9</sup>

The Commission should permit no exception to the 1,000 kW cap during the two-year review for the purpose of achieving full replication. Given the Commission's directive that stations may launch DTV by providing a signal over only the community of license, it is unlikely that a V-to-V station will need additional authorized power to

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<sup>7</sup> *Id.*

<sup>8</sup> Comments of MSTV at 22.

<sup>9</sup> *Id.* at 22-23.

replicate its NTSC Grade B contour for a few years. Indeed, such increased power requests could be viewed as an attempt to "lock in" for the V-to-U stations a large geographic area and will result in prohibiting U-to-U stations from maximizing so as to compete even within their geographically smaller markets. Regardless, U-to-U stations should first be permitted to maximize according to the immediate "intermediate maximization" plan detailed in Section III and all stations should then be allowed to maximize pursuant to a cut-off procedure.

Nevertheless, and notwithstanding Viacom's position on the priority of maximization, it would support, under the "test markets" proposal advocated below in Section III, limited experimental operations at levels above the 1,000 kW power cap. However, even the terms of such experimental operations must be agreed to by all participants in a given test market and any experimental authorization issued by the Commission should affirmatively and specifically condition operations on a date-certain termination of such higher-power operations. In other words, those stations granted experimental authority to exceed the 1,000 kW in test markets should not rely on this temporary authority as a permanent modification of their assignment.

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### **III. The Commission Should Grant on Reconsideration Proposals That Seek To Reduce The U-to-U/V-to-U Power Disparity.**

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#### **A. Maximization**

In its Petition for Reconsideration, Viacom enthusiastically supported the principle of maximization and envisioned its implementation under a "cut-off" procedure whereby all television broadcasters—even those not yet holding digital construction permits—would be eligible to participate. In this way, Viacom reasoned, those stations subject to a later digital roll out would not be disadvantaged in maximizing their service areas vis-à-vis those stations subject to an earlier launch.

However, Media General, Inc. ("Media General") in its petition urged the Commission to permit maximization *now* in order to immediately eliminate unfair power disparities.<sup>10</sup> In so doing, Media General noted, the Commission should permit stations to increase their power, even if interference is caused, upon a showing that interference can be avoided with engineering remedies such as directional antennas, new transmitter sites and terrain shielding.<sup>11</sup> Thus, Media General suggested that the Commission designate the Table in the *Sixth Report and Order* as a "second interim table" and allow stations additional time to bring engineering solutions and power maximization requests to the Commission.<sup>12</sup>

Viacom not only agrees with Media General's approach, but views a modified version of that approach as the best compromise toward alleviating the great power disparity suffered by U-to-U stations under the Table adopted in the *Sixth Report and Order*. Immediate "intermediate maximization," as Viacom views it, should be administered pursuant to a "window," which would open promptly for a three-month period. The window period would be reserved for those U-to-U stations which are assigned power levels more than four times less than that assigned to the highest powered station in the market.

Viacom's objective is only to maintain, not to exaggerate or mitigate, the existing level of competitive disparity between UHF and VHF stations. Thus, under an immediate "intermediate maximization" scheme, Viacom would support U-to-U maximization that is far short of the 1,000 kW cap such that UHF maximization at this first stage would be limited to a level which results in the subject U-to-U station achieving a power assignment that is no greater than four times less than that of the highest-powered station in the market, *provided that such maximization is feasible within the confines of the Table*

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<sup>10</sup> Comments of Media General at 3, 8-9.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 10.

*using accepted engineering remedies.* Any mutual exclusivity or conflicts arising among U-to-U stations in this intermediate maximization phase should be attempted to be resolved first, by negotiations among the affected parties, and, if that fails, by the Commission such that each affected party is permitted a proportionate level of maximization. Subsequent to this intermediate increase in power, when maximization is offered to all broadcasters, U-to-U stations would be permitted to fully maximize up to the 1,000 kW cap, if possible, as would V-to-U stations, using the cut-off procedures advocated by Viacom in its Petition for Reconsideration, as well as the flexible 50/50 interference proposal discussed below.

For example, under this immediate "intermediate maximization" plan, Viacom's Detroit and Atlanta stations—which are assigned to power levels of 50 kW, 20 times less than that of their V-to-U competitors operating at 1,000 kW— would each be permitted to maximize immediately to no more than 250 kW, which is *four times less* than that of the highest powered station of 1,000 kW in those markets. However, because preliminary engineering studies indicate that Viacom's Detroit and Atlanta stations would otherwise create interference to existing NTSC stations and/or to DTV stations, they could maximize immediately to 250 kW only by using directional antennas. Indeed, in any market in which a V-to-U station is assigned to operate at 1,000 kW, U-to-U stations would be permitted to immediately maximize to 250 kW, so long as they could do so without creating interference. Later, when cut-off procedures are implemented and all broadcasters are allowed to maximize, the Detroit and Atlanta stations could file to further maximize their facilities, subject to interference standards.

Unamended, the Table threatens irreparable injury to the competitive status of UHF stations and to the ultimate success of free-over-the-air digital television. Under the immediate maximization proposal described above, the Table could be amended, rather than overhauled, thereby honoring the roll out schedule established in the *Fifth Report and Order*. In fact, the immediate maximization plan set forth above leaves the Table

largely intact and places on U-to-U stations the burden of applying engineering remedies that will accommodate an increase of power of up to 250 kW. A three-month window provides ample time for broadcasters to undertake engineering studies and to file modification applications with the Commission. But the Commission should endeavor to promptly process and grant such applications. UHF broadcasters could then proceed into the digital world with a confidence that will encourage consumer electronics manufacturers and viewers to also enter that world.

#### **B. Channel 60-69/Modified Interference Standards**

Not all U-to-U stations are able to increase their power even to the 250 kW contemplated in the immediate "intermediate maximization" plan as described above. For example, even with the use of a directional antenna, Viacom's Boston station, WSBK(TV), can fully maximize only to 194 kW. And Viacom's Houston station, KTXH(TV), and Philadelphia station, WPSG(TV), cannot maximize at all beyond the power levels assigned to them in the Table. In order to accommodate greater maximization, particularly for U-to-U stations relegated to extremely low power levels, Viacom suggested in its Petition for Reconsideration that the Commission ease its restrictions on the use of Channels 60 through 69 and relax its definition of interference under certain specified circumstances. Several commenters propounded similar solutions.

With respect to Channels 60 through 69, the Commission adopted a "core" spectrum scheme in the *Sixth Report and Order*, which utilizes less than the spectrum between Channels 2 and 69 currently allotted to NTSC broadcast television. As a result of this "spectrum-packing," UHF stations are assigned to extremely low power levels and the ability of U-to-U stations to maximize is severely impaired. ALTV,<sup>13</sup> Univision Communications, Inc.,<sup>14</sup> the Minnesota Broadcasting Association<sup>15</sup> and WWAC, Inc.<sup>16</sup>,

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<sup>13</sup> Comments of ALTV at 1-2, 7.

<sup>14</sup> Comments of Univision at 16-17.

among others, also noted the deleterious effect that spectrum-packing has on U-to-U stations in particular.

While Viacom acknowledges the benefits of spectrum management and the ongoing efforts of the Commission to more efficiently use Channels 60 through 69 through its proposal in the recently adopted Notice of Proposed Rule Making,<sup>17</sup> service to the public by free-over-the-air digital broadcast television service cannot and should not be undervalued or subordinated to revenue-producing goals. Albeit for reasons other than reducing the power disparity, the Association for Maximum Service Television, Inc. ("MSTV") called for flexibility in the use of Channels 60 through 69. Viacom urges the same channel use flexibility in order to help mitigate the power level disparity between U-to-U and V-to-U stations through maximization, especially with respect to the immediate "intermediate maximization" plan discussed above.

As to interference, under the Commission's new DTV rules, stations may maximize their facilities provided no new interference is caused to other stations. Therefore, requests for an increase in operating power and/or height of antenna from that specified in the Table must be accompanied by a technical showing that the increase would not result in new interference or by statements by affected adjacent- or co-channel stations agreeing to the change.<sup>18</sup> In its Petition for Reconsideration Viacom advocated the use of the relaxed interference standard of a F(50/50) D/U ratio in lieu of the more restrictive F(50/10) ratio in areas outside of a station's Grade A contour, that is, at the outer fringe of the Grade B contour. This proposal was initiated by ALTV, of which Viacom is a member, and was also advanced in petitions separately filed by Paxson

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<sup>15</sup>Comments of Minnesota Broadcasting Ass'n at 9-10.

<sup>16</sup>Comments of WWAC, Inc. at 17-19, 21.

<sup>17</sup> *Reallocation of Television Channels 60-69, the 746-806 MHz Band* in ET Dkt No. 97-157, released July 10, 1997.

<sup>18</sup> *Sixth Report and Order* at ¶31.

Communications Corporation ("Paxson") and Sinclair Broadcasting Group, Inc. ("Sinclair").

Viacom herein reiterates the need for the relaxed interference standard, but with the limitation that it apply only in evaluating interference caused by and received from U-to-U stations. The power-level disparity created by the Table renders questionable for U-to-U stations the capacity to be received by direct-connected indoor antennas in their core service areas because of the well known multi-path and attenuation effects caused by the interference of massive physical structures on signals of inadequate power. In sum, by permitting the 50/50 proposal, as outlined in detail in both the ALTV and Viacom petitions, the Commission will aid maximization of U-to-U stations and thereby help to assure that viewers now receiving the Grade A NTSC signals of UHF stations may continue to receive those stations' programming in the digital world.

### **C. Antenna and Receiver Performance**

Viacom asserted in its Petition for Reconsideration that the assumptions relied upon by the Commission in formulating the Table do not reflect real-world information and, as a result, lead to fictional digital service areas and substantially competitively impaired U-to-U stations. Specifically, Viacom highlighted the faulty receive antenna and receiver models employed by the Commission. With respect to receive antennas, Viacom noted that the Table improperly assumed that consumer antennas used for reception of DTV signals would be better performing than those currently used for reception of NTSC signals. However, the indoor loop antenna, more often used by viewers for UHF reception than are outdoor antennas, has a significantly lower gain and directivity than does the outdoor antenna model used by the Commission. Therefore, the ease of reception of higher powered V-to-U stations is more attainable in the real world than is the reception of lower powered U-to-U stations. Moreover, the reception by portable devices of ancillary services, such as data transmission, will be dependent in part



upon even poorer performing pop-up antennas, rendering lower powered U-to-U stations unable to compete in the converging arena of video and data.

Granite Broadcasting Corporation ("Granite Broadcasting"),<sup>19</sup> Sinclair<sup>20</sup> and the engineering firm of Hammett & Edison, Inc. ("Hammett & Edison")<sup>21</sup> also stated concerns in their petitions with respect to the receive antenna model employed by the Commission. Viacom restates its assertion that the Commission must conduct studies to determine whether the performance of the Table's outdoor receive antenna model comports with that of widely used indoor antennas. Any discrepancy must be remedied by recalculating the assigned power levels to reflect real-world data or by mandating minimum receive antenna standards.

Similarly, as to receivers, the Commission incorporated in the Table a 7 dB noise figure for UHF receivers and a less sensitive 10 dB noise figure for VHF receivers. By relying on a more sensitive UHF receiver in constructing the Table, the Commission consequently was assigned to U-to-U stations power levels so inordinately low as to fall appreciably short of replication, and certainly below that needed to conduct a viable business. However, in its Petition for Reconsideration Viacom noted that the 7 dB receiver noise figure underlying the Table for UHF stations is at best speculative in that discussions with representatives of various receiver manufacturers reveal conflicting information with respect to the capability of this yet-to-be manufactured electronic equipment. Fox Television Stations, Inc. ("Fox") also noted in its petition that its conversations with receiver manufacturers disclosed that the 7 dB noise figure for UHF receivers is not likely to be achieved.<sup>22</sup>

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<sup>19</sup> Comments of Granite Broadcasting at 5.

<sup>20</sup> Comments of Sinclair at 9.

<sup>21</sup> Comments of Hammett & Edison at 5.

<sup>22</sup> Comments of Fox at 2.

Equally concerned with the Commission's optimistic receiver assumptions were Paxson,<sup>23</sup> Sinclair,<sup>24</sup> Univision<sup>25</sup> and MSTV.<sup>26</sup> Additionally, Fox also pointed out that even if UHF receivers were to meet the assumed 7 dB noise figure, the Commission ignored the further losses caused by splitters and videocassette recorders.<sup>27</sup> As did Viacom in its petition, Fox, Paxson, Univision and MSTV urged the Commission to mandate receiver manufacturers to design television sets that perform consistent with the 7 dB planning factor. Alternatively, Viacom advocated, as did Fox, that the Commission reassign power levels based upon a 10 dB noise figure. *Flaws as fundamental as those which form the very foundation of the Table should not and cannot be ignored upon reconsideration.*

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#### **IV. The Commission Should Grant on Reconsideration Other Proposals That Seek To Foster A Fair Broadcast Television System.**

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##### **A. Processing of Pending Modification Applications**

Certain parties in their petitions for reconsideration, including CBS Inc.<sup>28</sup> and Paxson<sup>29</sup> noted the procedural inequities inherent in the Commission's action of incorporating in the Table the modified facilities of those stations whose modification applications happened to be processed prior to April 3, 1997. Viacom supports the views of those who highlight the arbitrary nature of the Commission's actions. Indeed, not only

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<sup>23</sup> Comments of Paxson at 7-11.

<sup>24</sup> Comments of Sinclair at 7-11.

<sup>25</sup> Comments of Univision at 12-16.

<sup>26</sup> Comments of MSTV at 43-45.

<sup>27</sup> Comments of Fox at 2.

<sup>28</sup> Comments of CBS at 4, 7-8.

<sup>29</sup> Comments of Paxson at 17-26.

has the Commission refused to accord Table status to long-pending modification applications, but Viacom has recently learned that the Commission has, without notice, effectively frozen for an indefinite period of time even the conditional grant of all such applications.

Specifically, Viacom has had pending since June 28, 1996 an application for the modification of the facilities of WPSG(TV), Channel 57, Philadelphia.<sup>30</sup> That application seeks consent to a power increase and the use of an omnidirectional antenna in order to ameliorate what is perceived by advertisers as a relatively poor coverage area for the market. In short, the modification application is crucial to WPSG(TV)'s immediate ability to fully participate in the highly competitive Philadelphia NTSC television market. Moreover, in anticipation of grant of that application, and without any indication from the Commission that it might impose a *de facto* freeze on its application, Viacom has expended since mid-March nearly \$2 million on a new transmitter, omnidirectional antenna and labor costs associated with that equipment. Yet, because of the April 3, 1997 adoption of the digital Table, the Commission has placed all NTSC modifications in limbo.

In the *Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268 (released August 14, 1996) ("*Sixth Further Notice*"), the Commission stated its concern that modifications of existing NTSC stations could substantially affect the draft Table.<sup>31</sup> "We are concerned, however," the Commission stated in the *Sixth Further Notice*, "that freezing modifications to existing NTSC stations could pose hardships for broadcasters."<sup>32</sup> The Commission balanced the two concerns by committing to condition the grant of applications for modifications of technical facilities on the outcome of its

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<sup>30</sup> See File No. BPCT-960628KI. Viacom filed a minor amendment to this application on April 7, 1997 to correct the HAAT figure reported on the application as incorrectly supplied by the antenna manufacturer. The error was not known until receipt of the antenna from the manufacturer.

<sup>31</sup> See *Sixth Further Notice* at ¶63.

<sup>32</sup> *Id.*

final decision on the Table.<sup>33</sup> However, in the *Sixth Report and Order*, the Commission accommodated modifications to the Table that had been granted prior to the April 3, 1997 adoption of that order and removed the conditions placed on those modifications. Yet, broadcasters whose applications were not processed before April 3, 1997 are now confronted with the very "hardships" the Commission sought to eliminate. Further, as Paxson noted in its petition, the Commission did not make clear on what basis it had chosen to grant only certain applications and all pending applications are "at the mercy" of the Table.<sup>34</sup>

As did Paxson in its petition, Viacom here urges the Commission to process *all* modification applications pending as of July 25, 1996, the adoption date of the *Sixth Further Notice*. The Commission must not sacrifice the public interest in fostering continued competition among NTSC stations for expediency in devising a digital Table. Not only would such action be arbitrary, but it would result in irreparable harm to those broadcasters who, like Viacom, have expended substantial time and resources. Moreover, the Commission should treat all such pending applications in the same way as it did those it granted prior to April 3, 1997, by reassigning power levels based upon full consideration of the modifications and by incorporating the modifications into the Table.

#### **B. Compensation for Double Moves**

Granite Broadcasting<sup>35</sup> and MSTV,<sup>36</sup> among others, advocated adoption of Commission rules that would remove inequities imposed on stations assigned to DTV channels outside the "core" spectrum. Specifically, Granite asserted that the Commission should require the compensation of relocation costs for all stations that are forced to make second channel moves. Funding for these moves, under Granite's proposal, would derive

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<sup>33</sup> See *id.*

<sup>34</sup> Comments of Paxson at 18.

<sup>35</sup> Comments of Granite at 8-10.

<sup>36</sup> Comments of MSTV at 33-34.

from new users of freed-up spectrum or auction proceeds from the sale of spectrum recaptured after the transition. As MSTV asserts, a compensation requirement must be set by the Commission on reconsideration rather than deferred to a subsequent proceeding.<sup>37</sup>

Viacom agrees with Granite's and MSTV's proposals. Indeed, of Viacom's 11 television stations, one must move twice to accommodate the Commission's objective of packing all 1600 television broadcast stations into only 270 MHz of spectrum. Viacom estimates that a station will incur substantial costs for a second move, an amount which should be fully subsidized by newcomers to what will be the former broadcast spectrum, who will be directly benefiting from television stations' double moves. It is imperative, as MSTV notes, that compensation guidelines be established promptly in *this* proceeding so as to provide stations with "much-needed certainty" going forward in the costly digital era.<sup>38</sup>

### **C. Neutral Coordinating Committees**

MSTV requested that the Commission establish on reconsideration "DTV coordinating committees, define their appropriate role and provide the tools these committees will need to help broadcasters and the Commission as DTV rolls out."<sup>39</sup> The concept of coordinating committees, which are to be headed by private-sector coordinators in 10 regions covering the entire country, was proposed by MSTV as a means of facilitating changes to the DTV Table. As noted by MSTV, the *Sixth Report and Order* merely endorsed the notion of industry coordination of DTV allotment and facility modifications.<sup>40</sup>

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<sup>37</sup> *Id.* at 33.

<sup>38</sup> *Id.* at 34.

<sup>39</sup> Comments of MSTV at 28.

<sup>40</sup> See *Sixth Report and Order* at ¶182.

Viacom also supports the coordinating committee concept, but seeks assurances that such committees will be neutral and that the Commission will always serve as the final arbiter of any coordinating committee determination that is questioned by any interested party. In light of the power disparity between V-to-U and U-to-V stations, it is imperative that U-to-U stations are able to fully participate in coordinating committee decisions. And, it is important that the Commission retain the right to review *de novo* all coordinating committee decisions.

#### **D. Additional Time for Assessing Table Assignments Under OET Bulletin No. 69**

In its petition for reconsideration, Viacom pointed out the power level disparities between V-to-U and U-to-U stations and the flaws in the planning factors used to construct the Table. However, because the Commission had not yet released OET Bulletin No. 69 as of the deadline for filing petitions for reconsideration, no broadcaster, including Viacom, had the ability to accurately evaluate its Table assignment vis-à-vis other broadcasters. Indeed, several petitioners requested additional time from the date of publication of OET Bulletin No. 69 to assess their DTV assignments. It is established in administrative law that an agency must disclose the methodology underlying its rules in a manner that assures fairness to affected parties and permits meaningful judicial review of the agency's decision.<sup>41</sup> To that end, on July 2, 1997, the Commission released OET Bulletin No. 69 simultaneously with an *Order* in this proceeding, which granted to "parties that submitted petitions for reconsideration requesting modification of their DTV allotments" a brief period of additional time to file supplemental presentations relating to those requests.<sup>42</sup> The *Order* sets August 22, 1997 as the deadline for the filing of such presentations. Now that the Bulletin has been released, Viacom can engage in a meaningful station-by-station evaluation of its stations' Table assignments. Viacom reserves the right to supplement its Petition for Reconsideration in response to the *Order*

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<sup>41</sup> See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); see also Section 553 of the Administrative Procedure Act, 5 U.S.C. §553.

<sup>42</sup> *Order* in MM Docket No. 87-268, DA 97-1377 (released July 2, 1997) at ¶5.

so that it may undertake a proper detailed analysis of the assignment of each of its 11 television stations.

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**V. A Real-World "Test Market" Proposal Is Needed In Order to Generate Empirical Data That Will Allow the Commission to Make Fair Assessments of the New Digital Service.**

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In the *Fifth Report and Order*, the Commission directed ABC, CBS, Fox and NBC affiliates to build their digital facilities in the ten largest television markets by May 1, 1999. Several stations in the top ten markets have also volunteered in writing to construct DTV facilities by November 1, 1998. Of Viacom's 11 stations, six are located in the ten largest television markets, but because these six are all UPN affiliates they are not obligated to construct their digital facilities until May 1, 2002. However, in order to promote a "test market" study, Viacom stands ready and willing to commit in two of these top ten markets to accelerate the construction of its digital facilities—even by the earlier 18-month voluntary deadline. However, in offering this early build-out, Viacom conditions its pledge upon the Commission's commitment to use the empirical data generated by the test markets and, if necessary, to amend the Table to reflect the real-world data collected.

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**VI. Conclusion.**

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In light of the foregoing, Viacom requests that the Commission grant and deny the petitions for reconsideration to the extent described above.

Respectfully submitted,

Viacom Inc.

By: 

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Anne Lucey

1515 Broadway

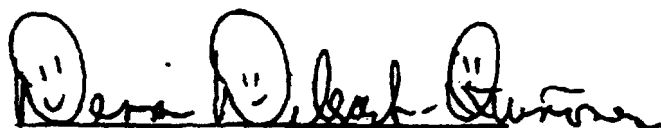
New York, NY 10036

July 18, 1997



**CERTIFICATE OF SERVICE**

I, Diana Delgado-Quñones, do hereby certify that true and correct copies of the foregoing "Opposition to Petitions for Reconsideration," were sent by first-class, postage prepaid mail, this 18th day of July, 1997, to all parties filing Petitions for Reconsideration in MM Docket No. 87-268.

  
Diana Delgado-Quñones